STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP110-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES LEE EADY, JR.,

Defendant-Appellant.

On Appeal From a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Charles F. Kahn, Jr., Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Evidence at Trial Was Insufficient To Show That Mr. Eady Robbed A Financial Institution.

Mr. Eady was convicted of robbing a "financial institution," but the State failed to prove that the place robbed was a financial institution, as that term is defined by statute. Wis. Stat. § 943.80(2). The State was required to prove that the victim was a bank "chartered under the laws of this state, another state or territory, or under the laws of the United States." Wis. 943.80(2); (Respondent's Brief at 2). The record includes no evidence proving or disproving that the location was a *chartered* bank. Therefore, the State failed to prove each element beyond a reasonable doubt, and this Court should reverse. ***State v. Wulff***, 207 Wis. 2d 143, 144, 557 N.W.2d 813 (1997).

The State writes that Mr. Eady "does not dispute that, on the date of the offense, U.S. Bank was a financial institution within the meaning of Wis. Stat. § 943.87." (Respondent's Brief at 2). This mischaracterization of Mr. Eady's argument highlights the dispute at the center of this case. Mr. Eady simply has no idea whether the victim was a "financial institution" as defined by statute. Neither did the jury. The record is silent on the issue.

The State urges that it "introduced sufficient circumstantial evidence to prove that U.S. Bank was chartered at the time of the offense." (Respondent's Brief at 4). Although there was ample circumstantial evidence that the place was a bank, there was no circumstantial evidence that the place had a charter to bank. How does one circumstantially prove a charter? Testimony from employees

and police indicated that the place was a bank, and that it had the look and the feel of a bank, but did nothing to prove or disprove the existence of a charter. A charter is not particularly susceptible to circumstantial proof.

This does not mean that the State needed to introduce chartering documents as an exhibit. All the State needed to do was ask a witness with personal knowledge whether the bank was chartered. That is all.[1]

State v. Powers is controlling precisely because licenses and charters are not particularly susceptible to circumstantial proof. 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50. It is true that in ***Powers***, the parties agreed that the VA hospital was not a qualifying "health care facility." ***Id.***, ¶ 10. But that stipulation is irrelevant to the outcome. ***Powers*** proves that a conviction cannot stand where the State cannot prove an essential element of its offense, even when the element is proving something like licensure or a charter. ***Id.***, ¶ 20. Even these small details, where they are elements of the offense, must be proven beyond a reasonable doubt. And this is precisely why some minimal direct evidence is needed. Had the defendant in ***Powers*** gone to trial, witnesses from the VA hospital would have testified about the hospital, and the jury may have seen pictures of the hospital. It is entirely plausible (if not likely) that the jury would have concluded that the hospital was a "health care facility" based on the circumstantial evidence. But the jury would have been wrong, and the defendant would have been convicted of a crime he did not actually commit.

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[1] The State traditionally asks a similarly direct question to establish that the offense actually occurred in the county where the charge is filed. For example, in this case, the State asked its first witness to confirm that the offense took place at "5526 Capitol Drive in the city of Milwaukee, Milwaukee County, state of Wisconsin." (43:62-63).

It is irrelevant that there is no concession from the State in this case like there was in ***Powers***. There is still no evidence proving that the victim was a chartered bank. The State cannot be saved by its arguments that Mr. Eady "has never contended that U.S. Bank was not chartered under state or federal law." (Respondent's Brief at 9). Disproving a charter was never Mr. Eady's burden. And Mr. Eady had no obligation to raise this issue before trial. The absence of evidence proving or disproving the charter means the State failed to carry the burden to which it is constitutionally bound. The burden cannot now be shifted to Mr. Eady. "[I]t is axiomatic in the law that the state bears the burden of proving all elements of a crime beyond a reasonable doubt. This burden of persuasion remains with the state throughout the trial, and as to any element the burden cannot be shifted to the defendant." ***State v. Shulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981) (internal citation omitted).

The State's analogy to ***State v. Booker*** misses the mark. 2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676. There, the defendant was charged with exposing a child to harmful materials after showing a pornographic video to three young girls. ***Id.*** at ¶¶ 2-3, 10; Wis. Stat. § 948.11. The pornographic video was never actually shown to the jury. ***Booker***, 292 Wis. 2d 43, ¶ 9. Instead, the victims and a detective testified about some of the specific sexual acts that could be seen on the tape. ***Id.***, ¶ 8. The Wisconsin Supreme Court held that the testimony was sufficient for a conviction, and that the jury did not need to watch the tape to determine whether it contained harmful material; it was sufficient that there was testimony describing the content. ***Id.***, ¶¶ 23, 25-27.

Booker is nothing like this case. In that case, the testimony provided *some* evidence that the video included harmful material. In contrast, there was *no* evidence in this

case that the victim was a chartered bank. Had a witness testified that the U.S. Bank was chartered, ***Booker*** would apply, and the evidence in this case would probably be sufficient. But the State failed to offer even that scintilla of evidence.

This case is more like a hypothetical recreation of ***Booker*** where the State introduced neither the video, nor testimony about the content of the video. In that case, the jury would have had no evidence (other than the charge) to infer that the material was harmful. In that case, there would clearly be no basis to conclude that the video contained harmful material, much less reach that conclusion beyond a reasonable doubt. Similarly, there is no basis in the record to conclude that the victim in this case was a chartered bank.

The State also argues that the possibility of a place looking like a financial institution, but not actually being a financial institution, is so remote as to be unreasonable. (Respondent's Brief at 6). But again, this is an attempt to convert the State's burden to prove the existence of a charter into a defendant's failure to prove the lack of a charter. The State would have it that anytime a place has the look or feel of a bank, it has met its burden to circumstantially prove that the place is a bank, and the defendant must carry the burden to prove that it is *not* a chartered institution.

Although fake bank scams are abundant on the Internet, Mr. Eady agrees that it would take a particularly enterprising individual to create a facility that successfully passes itself off as a bank. But it has been done.[2] A fake bank

[2] China: Fake Bank Swindles Customers Out of $32m, http://www.bbc.com/news/blogs-news-from-elsewhere-30932424 (last visited July 2, 2015).

branch in China was in operation for over a year before it was detected.

The State's argument is also short-sighted. The same act that created robbery of a financial institution also created a series of other crimes that could be committed only against financial institutions. 2005 Wis. Act. 212. A robbery is an in-person offense that requires a physical location to commit the crime. Thus, it may be more challenging to *rob* an unchartered bank. But "financial institutions" can also be victims of extortion, fraud, or theft. Wis. Stat. §§ 943.81, 943.82, 943.85. In those instances, crimes against financial institutions can occur without any physical structure, and it hardly takes an active imagination to conjure up an example of a company providing a financial service as if it were a financial institution, but it does not actually satisfy the statutory definition.

Non-banking companies are increasingly providing more and more financial services. PayPal, Google Wallet, and Bitcoin banks[3] all offer financial services, but none would appear to satisfy the definition of a "financial institution." Even Walmart is now offering its own banking services.[4] And all of these services could be the victim of theft or fraud. But if a jury were permitted to rely on inferences based on the nature of the service provided, they could easily conclude that the defendant committed an offense against a financial institution. Allowing the State to dispense with the requirement that it prove the victim is actually a "financial

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[3] *See, e.g.*, Bitcoin, https://bitcoin.org/en/choose-your-wallet (last visited July 2, 2015).

[4] Paul Gores, *Walmart's New GoBank Has Bankers on Edge*, http://www.jsonline.com/business/walmarts-new-gobank-has-bankers-on-edge-b99364057z1-278326621.html (last visited July 2, 2015).

institution" creates a very real risk that these offenses will be misapplied and result in erroneous convictions.

The legislature has provided enhanced penalties for robberies and thefts of "financial institutions," not places that offer financial services. The State was required to prove that the victim in this case was a bank with a government-issued charter, not that the place *seemed* like a bank. The State failed to introduce sufficient element to prove that element of the offense. Therefore, this Court should reverse the decision of the circuit court and instruct that a judgment of acquittal be entered. ***Wulff***, 207 Wis. 2d at 144.

CONCLUSION

For the reasons stated above, and in his initial brief, Mr. Eady asks that this Court reverse the decision of the circuit court and remand with instructions to enter a judgment of acquittal.

Dated this 3rd day of July, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,643 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of July, 2015.

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